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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1140

KING RADIO CORPORATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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No. .....

KING RADIO CORPORATION, INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

Petitioner, King Radio Corporation, Inc., petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Tenth Circuit entered in this case on November 3, 1969, enforcing an order of the National Labor Relations Board; petition for rehearing denied on November 17, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 416 F.2d 569 (C.A. 10), 119-68, September 17, 1969, 72 LRRM 2245. The Court of Appeals enforced in part and denied in part a decision of the National Labor Relations Board reported at 172 NLRB No. 109. Both the opinion of the National Labor Relations Board and the Court of Appeals are printed herewith at J. App. Vol. II, pp. 1069-1184 and App. pp. A1-A7.[1]

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Tenth Circuit, entered November 3, 1969 (App. pp. A8-A17), is involved under the provisions of 28 U.S.C. Section 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.).

QUESTION PRESENTED

The question presented is whether an employer violates the good faith bargaining provisions of Section 8(a)(5), (1) and (d) of the National Labor Relations Act by unilaterally instituting a wage change after the certified bargaining representative has been given an opportunity to discuss the proposed change but has rejected it as insufficient.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.

1. The abbreviation "App." refers to the appendix to this petition.

Section 151, et seq.) which are involved in this case are set forth in the Appendix, pp. A18-A21. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the National Labor Relations Act are set forth immediately below:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

STATEMENT OF THE CASE

The judgment and decision, of which review by this Court is now sought, enforced the order of the National Labor Relations Board requiring the petitioner to cease and desist from:

> "Engaging in surface bargaining or other collective bargaining not in good faith, without real intention of reaching agreement with Communications Workers of America, AFL-CIO, as duly designated exclusive bargaining representative of its employees. . . .
>
> "Maintaining in effect for an employee in said bargaining unit, the wage structure system or any portion or aspect thereof established by Respondent on or since February 1, 1967, other than all wage increases granted thereunder whether pursuant to any minimum wage law amendment or otherwise; unless bargained in good faith with said Union. . . .

"Unilaterally changing, threatening to change, or announcing any change in, wages (except as may hereafter be required by the express provisions of any minimum wage law or amendment or other statute), wage rate progressions, wage structure system, or any other term or condition of employment of said bargaining unit employees without bargaining in good faith with said Union in regard thereto. . . .

"Take the following affirmative actions necessary to effectuate the policies of the Act:

"(1) Forthwith abrogate, cancel, and disestablish, in all respects, the wage structure system which Respondent unilaterally established and placed into effect for bargaining unit employees on and since February 1, 1967; *provided,* however, (a) that all increased minimum wage rates, whether statutory or otherwise, for all job classifications, placed into effect by Respondent for said unit employees on or since February 1, 1967 shall not be abrogated, reduced or otherwise changed without bargaining in good faith with the Union thereon, *and* (b) that in all respects other than said increased minimum wage rates (whether statutory or otherwise, for all job classifications), the wage rate progressions, wage rate progression system (including automatic wage rate progressions), and all other features of Respondent's wage structure system which were in effect immediately prior to Respondent's said February 1, 1967 unilateral change, shall forthwith be reinstituted and restored, and shall not be changed without bargaining in good faith with the Union thereon.

"(2) Forthwith abrogate, cancel, and disestablish all changes in any term or condition of employment of said bargaining unit employees, other than any increase in minimum wage rates (whether statutory or otherwise, for all job classifications) as hereinabove provided, which have been established for

said unit employees by Respondent at any time since said unit employees have been represented for collective bargaining by Communications Workers of America, AFL-CIO, unless said changes are bargained in good faith with said Union."

King Radio Corporation, Inc. (hereinafter referred to as the "Company" or "Petitioner") contends that the National Labor Relations Board (hereinafter referred to as the "Board") is in effect requiring an agreement be consummated before wage adjustments may be made regardless of the length or period of time the negotiations extend without an agreement, and that this unduly interferes with the employer's operation of the business.

This case initially arose from negotiations between the Company and the Communications Workers of America, AFL-CIO (hereinafter referred to as the "Union"), for a collective bargaining agreement. These negotiations commenced on October 25, 1966 and continued through January 9, 1967 with the Union insisting upon wage increases of approximately forty (40) to fifty-five cents (55¢) an hour during the first year of the contract. This included immediate increases of approximately twenty-two and one-half cents (22 1/2¢) an hour with ten cent (10¢) an hour increases each ninety (90) days thereafter. The Company proposed the starting rate for new employees be increased from $1.25 to $1.40 an hour and that new base and top rates be established for each classification with five cent (5¢) increases each ninety (90) days for employees between the starting and base rates with a minimum of five cent (5¢) increases each six (6) months from the base to the top rates. The Company's policy prior to the advent of the Union had been to start employees at $1.25 an hour and increase them five cents (5¢) each thirty (30) days for four (4) consecutive months with review periods for wage

increases each ninety (90) days thereafter. After various wage proposals were submitted and discussed by the parties, representatives of the Union negotiating committee requested the Company consider an immediate ten cent (10¢) an hour wage increase for all bargaining unit employees at the conclusion of the January 9, 1967 bargaining session.

By letter dated Janary 12, 1967, the Company proposed a ten cent (10¢) an hour across the board increase provided the Union would accept the Company's last proposed minimum wage schedule; two (2) consecutive wage review periods as proposed by the Company be passed, and employees' starting rates be increased from $1.25 to $1.40 an hour. The Union made no attempt to respond to the Company's January 12, 1967 wage proposal and requested no meetings to discuss it. After awaiting more than two (2) weeks for a response from the Union, respondent, by letter dated January 28, 1967, informed the Union that as a result of the Fair Labor Standards Act minimum wage increase to $1.40 on February 1, 1967, the Company intended to institute a "wage increase to all bargaining unit employees not to exceed those offered but rejected by the Union."

Upon receiving the respondent's January 28 letter, the Union's business representative requested that a meeting be arranged as soon as possible. Pursuant to this request a meeting was scheduled for January 31, 1967. The meeting opened with the parties reviewing the various wage proposals that had been submitted by each of them during the negotiations. The Union's business representative explained his interpretation of the Company's January 12 wage proposal and was informed that his interpretation was correct. The Union representative asked why the Company was proposing to increase wages other than those

affected by the change in the minimum wage law, i.e., employees who were already receiving in excess of $1.40 an hour. Company representatives explained that if employees receiving the lower rates were increased without adjusting other employees receiving higher rates upward, a considerable inequity would be created and in many instances employees with less tenure would receive the same rate of pay as employees who had spent more time with the Company. This the Company thought would result in considerable dissatisfaction among the employees. The Union representative then asked whether the Company intended to institute the wage increase unilaterally and the petitioner's representatives replied that the Company hoped the adjustment would not be unilateral and that the Union would agree the increase was necessary. At this time the Union representative charged the Company with attempting to undermine the Union's bargaining position. It was suggested that a joint notice be drafted announcing the increase in an effort to avoid any possibility of this occurring, with the understanding that the adjustment would not prejudice the Union's right to continue to ask for additional increases at the bargaining table.

At this time representatives of the Union and the Company together drafted a notice to be used to announce the wage adjustment to bargaining unit employees.

All subjects included in the joint notice to employees were discussed between the Union and the Company representatives on January 31, 1967, including the language which provided that new hires would receive a training rate until the first Monday following sixty (60) days of employment, at which time they would receive a starting rate of $1.50 an hour for their classification. The Union representative admitted the only item included within the joint notice which had not been proposed to the Union be-

fore January 31 was in connection with the training period for pay purposes being reduced from ninety (90) to sixty (60) days, i.e., granting a ten cent (10¢) increase at sixty (60) days rather than ninety (90) days.

On February 1, 1967, after being informed the Union objected to the proposed wage change, petitioner posted the notice announcing the wage change that had been drafted by representatives of both the Union and the Company during the meeting of January 31 on its plant bulletin boards. A copy of that same notice was sent to the Union on February 6, 1967.

Sometime after the February 1, 1967 notice was posted notifying employees of the wage adjustment, the Union distributed a leaflet advising all bargaining unit employees of the Union's position.

The Union, by notice to employees dated February 21, 1967, acknowledged that an impasse on the subject of wages had been reached on January 9, 1967, and that the Union had submitted its end position on wages to the Company on that date. Unfair labor practice charges (Volume I, JA 1663-1664)[2] were filed on June 1, 1967 and on August 30, 1967 the Board issued a complaint against the Company (Volume I, JA 1665-1669). The Board issued its original decision and an order finding the Company had violated Section 8(a)(5) of the National Labor Relations Act by failing to bargain in good faith with the Union, including unilateral establishment on February 1, 1967 of a wage proposal submitted by a letter to the Union dated January 12, 1967. The Board ordered the Company to bargain collectively with the Union and to abrogate, cancel and disestablish the wage structure system which the Company

2. The abbreviation "JA" refers to the Joint Appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

established and placed into effect on February 1, 1967, which was identical to the proposal submitted to the Union on January 12, 1967.

On October 15, 1968 the Board filed in the United States Court of Appeals for the Tenth Circuit (hereinafter referred to as the "Court of Appeals") a petition seeking enforcement of the Board's original decision and order. On September 17, 1969 the Court of Appeals enforced the Board's original order in part (416 F.2d 569 (C.A. 10), 119-68, 72 LRRM 2245).

REASONS FOR GRANTING THE WRIT

Initially it should be emphasized that this case does not involve the question of whether a company can be ordered to cancel or disestablish a wage change without first giving the union an opportunity to discuss it, nor does it involve the question of whether a company violates its obligation to bargain in good faith by unilaterally instituting a wage increase greater or better than offered to and rejected by the union. In this case, the Company has been expressly ordered to disestablish, cancel and abrogate a wage change identical to one which was proposed, discussed and rejected by the Union.

The important point of this case is not whether this particular Union should or should not be granted a certain wage increase or a provision for progression increases at the Company's plant, but whether the Board, as a remedy for violations of Section 8(a)(5) of the National Labor Relations Act, can so involve itself in the collective bargaining process as to compel concessions which could not be won at the bargaining table, since the effect of the Board's order, as enforced by the Court of Appeals, is to force an employer to meet the Union's terms or leave the wages,

hours and working conditions of bargaining unit employees unchanged indefinitely or for whatever period it takes the parties to reach an agreement.

This issue is of paramount importance in the administration of labor relations statutes and the enforcement of the refusal to bargain provisions of the National Labor Relations Act throughout the country. To accept the Board's view will prohibit an employer from making changes deemed necessary for the continued successful operation of the business if they affect bargaining unit employees, even though it has complied with Section 8(a) (5) and 8(d) of the Act by giving notice to the Union of the reason for the desired change and an opportunity to discuss it.

This Court has consistently held that a "unilateral action by an employer *without prior* discussion with the Union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to congressional policy." *NLRB* v. *Katz*, 369 U.S. 736, 747, 82 S.Ct. 1107, 1114. At the same time, however, without settling the question, it has recognized there is no resemblance between this situation and one wherein an employer, after notice and consultation, "unilaterally institutes a wage increase identical with one which the Union has rejected as too low." *NLRB* v. *Katz*, 369 U.S. 736, p. 745, 82 S.Ct. 1107, 1113.

The facts in this case and the instant case are the same as those set forth but distinguished by this Court in *NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217, 224, 69 S.Ct. 960, 963, 93 L.Ed. 1320, wherein it was held that a unilateral wage increase substantially greater than that previously offered to the Union, without consulting the Union or affording it an opportunity to negotiate with re-

spect thereto, violated 8(a) (5) of the Act. In reaching this conclusion the Court stated:

> "We do not here have a unilateral grant of an increase in pay made by the employer after the same proposal has been made by the employer in a course of collective bargaining but has been left unaccepted or rejected in those negotiations."

The Board's conclusion, as enforced by the Court of Appeals in this case, holding that a unilateral increase made with the understanding that the adjustment will not affect the Union's right to continue to ask for additional increases after the Union has been afforded an opportunity to negotiate but has rejected it as too low is in effect a refusal to negotiate, is contrary to this Court's pronouncements in *Katz*, 369 U.S. 736, 82 S.Ct. 1107, and *Crompton-Highland Mills*, 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320. It is also in conflict with the pronouncements of other circuits that a unilateral change in wages after notice and consultation with the Union does not violate 8(a) (5) of the Act. (See *NLRB* v. *Bradley Washfountain Co.*, 192 F.2d 144-150, 152 (7 Cir.) and *NLRB* v. *Landis Tool Co.*, 193 F.2d 279 (3 Cir.).)

In fact, the Board's present order is even in conflict with a prior decision of the same Court of Appeals. See *NLRB* v. *United Nuclear Corporation*, 381 F.2d 972 at 976 (C.A. 10), wherein it was stated:

> "Turning to the 8(a) (5) and (1) violations based on asserted unilateral actions by Nuclear, it is established that unilateral changes in working conditions which are the mandatory subject of collective bargaining are violations of the Act. See N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230; American Sanitary Products Company v. N.L.R.B., 382 F.2d 53 (C.A. 10). And this is so regardless of the good faith of the employer. N.L.R.B. v. Katz, supra, 369

U.S. p. 743, 82 S.Ct. 1107. However, if the Union is afforded a reasonable opportunity to bargain concerning the proposed change, see N.L.R.B. v. Brown-Dunkin Co., 10 Cir., 287 F.2d 17 . . . the employer may lawfully take the proposed action."

It is respectfully submitted that the facts of the present case provide this Court with an excellent vehicle to decide an issue of substantial importance in the administration of this country's labor relations law and one that has been recognized as such by this Court, but left unsettled. *NLRB* v. *Katz*, 369 U.S. 736, 82 S.Ct. 1107, and *NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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January 30, 1970

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JULY 1969 TERM

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
KING RADIO CORPORATION, Inc.,
Respondent.

No. 119-68

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed September 17, 1969)

Paul J. Spielberg, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel and Peter Kinzler, Attorney, National Labor Relations Board, on the brief) Washington, D.C., for Petitioner.

William G. Haynes (Lillard, Eidson, Lewis & Porter, on the brief) Topeka, Kansas, for Respondent.

Before MURRAH, Chief Judge, TUTTLE* and BREITENSTEIN, United States Circuit Judges.

MURRAH, Chief Judge

This is a proceeding to enforce a Decision and Order of the National Labor Relations Board finding respondent guilty of violating Section 8 (a) (1) by: its no talking and warning notice rule; threatening its striking em-

*Of the Fifth Circuit, sitting by designation.

ployees with discharge, permanent replacement and loss of economic benefits; and violating Section 8 (a) (5) and (1) by: unilateral wage changes; unilaterally contracting out bargaining unit work; and failing to bargain in good faith.

Affirmatively, respondent was ordered to: (1) Abrogate the wage changes; (2) Bargain in good faith; (3) Upon request, reinstate all striking employees to available positions without prejudice to their wage rates, seniority and other rights and privileges. And if enough positions are not available, place all striking employees on a perferential hiring list.

When this case was here in 398 F.2d 14, to enforce an order of the Board, we sustained the Board's finding to the effect that the no talking and warning notice rule was a discriminatorily inspired violation of Section 8 (a) (1) and (5). The no talking and warning notice rule involved here is but a continuation of the rule formerly condemned both by the Board and this court. We again sustain the Finding and Order of the Board based upon the condemned practice.

This brings us to the unilateral wage changes in the bargaining unit found to be a Section 8 (a) (5) and (1) violation. Respondent suggests that a part of the wage change was required by the federally established minimum wage and prompted a good faith wage increase for all bargaining unit employees.

This argument seems plausible on its face. But the Board thought, not without justification, that the wage changes instituted as they were during negotiations on that very subject, were suspect of an 8 (a) (5) violation. And when considered with the fact that the wage increases were inequitably distributed among the employ-

ees in the bargaining unit without regard to merit, a clear violation was shown.

Unilateral changes in wages and working conditions during negotiations concerning the same subject matter are clear manifestations of a lack of good faith bargaining and violate Section 8 (a)(5). And this is so, even though the employer may have desired to reach an overall agreement. N.L.R.B. v. Katz, 369 U.S. 736, N.L.R.B. v. United Nuclear Corporation, 381 F.2d 972 (10th Cir.). Unilateral action in matters of this kind can be justified only after the parties have bargained in fact to an impasse. N.L.R.B. v. United Nuclear Corporation, supra.

The most then that can be said for respondent's position is that the unilateral wage changes were instituted after the point of impasse had been reached. Respondent insists that they were so instituted. The Board found to the contrary. And we quite agree. The wage changes were instituted during purported negotiations concerning that very subject. And if respondent was not bargaining in fact, it was not bargaining in good faith. And the violation is clearly manifest.

The Board found that respondent contracted bargaining unit work to a third party from April to June, 1967, without notice to or bargaining with the union concerning the work in violation of Section 8 (a)(5) and (1). The Order is apparently based on the hypothesis that unilateral contracting out of any work is an 8 (a)(5) violation. We cannot accept the hypothesis.

It is established that the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions is a mandatory subject of collective bargaining under Section 8 (d). Fiberboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203. Before Fibreboard, but consistently with its ra-

tionale, we sustained a Board order based upon a finding that the subcontracting work did effect a displacement of the employees of the bargaining unit in violation of 8 (a) (5). N.L.R.B. v. Brown-Dunkin, 287 F.2d 17, (10th Cir.). But we recognized that not every unilateral contracting out is an unfair labor practice per se. And subsequent cases have prudently balanced the essential managerial prerogatives against the collective bargaining rights of employees by requiring a showing that the unilateral contracting out of work in some way adversely affected the hire and tenure of the bargaining unit employees. District 50, United Mine Workers v. N.L.R.B., 358 F.2d 234 (4th Cir.); Puerto Rico Telephone Company v. N.L.R.B., 359 F.2d 983 (1st. Cir.).

Applying this test, we fail to see how the contracting out of the work in our case in any manner adversely affected the hire and tenure rights of the employees. In the first place, the contracting out involved only a small amount of labor (124 work hours) and occurred while the employees were on strike. The contracting out was of a temporary nature and in no way changed respondent's employment structure. Indeed, the Board did not find that the contracting out adversely affected the hire and tenure of the bargaining unit employees. Absent a showing of significant adverse impact on the bargaining unit, we must decline to enforce the Order of the Board in this respect.

In this connection, the Board also found that respondent violated Section 8 (a) (5) and (1) by failing to inform the union of its intention to contract out the work in question. This would be so if the contracting out did in fact adversely affect the hire and tenure of bargaining unit employees. But since, in our view, it did not, the employer did not violate the Act by failing to inform. Respondent proceeded at its peril but committed no offense. Cf. N.L.R.B. v. Brown-Dunkin, supra.

The Board found that the strike was an unfair labor practice strike from its inception and has been prolonged by the unfair labor practices of respondent. And we sustain that finding as supported by the evidence.

One of General Counsel's exhibits was the notice for a strike vote meeting. The notice referred to dismissal of employees for union activity, arbitrary establishment of the no talking rule, failure to bargain in good faith and the unilateral wage increase. Union Negotiator Lovett testified that he used the handbill during his speech at the strike vote meeting. Local President Jamison testified employees stated at the meeting they could not continue to work because of the harassment at the plants. Another exhibit was the strike notice. It stated the strike was the result of numerous unfair labor practices of respondent and referred to the rule of the "Iron Fist and Closed Mouth" prevailing at the plants.

The strike commenced after the unfair labor practices which the Board found. And which we have sustained. It is sufficiently plain that the strike was actuated by these practices. It follows that the strike was itself an unfair labor practice strike.

The Board found respondent violated Section 8 (a) (1) by sending to the striking employees a letter threatening them with loss of employment and benefits unless they returned to work by a designated date. Respondent denied the letter was an unfair labor practice because the strike was economic in nature. This contention has been disposed of by our characterization of the strike.

Respondent then asserts the letter is not prohibited by Section 8 (a) (1) since the communication only said the company was considering replacing the strikers. The challenged paragraph reads as follows:

> "During the strike the Company plans to remain open and to hire replacements as needed. Serious consideration will be given to replacing any employee who has not reported to work by the normal starting time Monday, April 3rd. Once a striking employee is permanently replaced he or she will no longer be considered an employee of the company."

We start with the proposition that the employer was entitled to express his views if the expression contained no threat of reprisal or force or promise of benefit. 29 U.S.C. Section 8 (c). If the coercive nature of the statement is clear from the language itself, then no inquiry into the circumstances under which the statement was made is required. As Judge Hill has said so well for us: "Although on occasion the coerciveness of a statement is patently obvious, generally the test of coerciveness is one of total impact to be determined in light of the background in which the statement is made." N.L.R.B. v. Automotive Controls Corporation, 406 F.2d 221 (10th Cir.). It is thus distinctly relevant that the letter was written in a context of other unfair labor practices. Serv.-Air, Inc. v. N.L.R.B., 395 F.2d 557 (10th Cir.) Cert. Denied 393 U.S. 840.

Applying these principles, we agree with the Board that the letter constituted a threat and was an unfair labor practice. The letter was sent in the context of events that included continued enforcement of the condemned no talking rule, unilateral wage changes and a failure to bargain in good faith. The Board properly concluded that respondent traversed the line between permissible persuasion and forbidden coercion.

Respondent asserts that a portion of the remedy ordered by the Board is punitive rather than remedial in nature. As we have seen, the attacked portion of the

Order required respondent to abrogate the unilateral wage changes with the exception of the newly adopted minimum rates. Reinstatement of the wage rate progression system existing immediately prior to the unilateral changes was also ordered.

The primary responsibility for the formulation of a remedy rests with the Board, and this court will not strike down a proposed remedy, unless it can be said to be oppressive and not designed to effectuate the policies of the Act. N.L.R.B. v. General Drivers, Chauffeurs, Helpers, Etc., 264 F.2d 21 (10th Cir.). It is the function of the Board, not the judiciary, to determine how the effect of an unfair labor practice may be expunged. Furr's Inc., v. N.L.R.B., 381 F.2d 562 (10th Cir.). Cert. denied 389 U.S. 840.

We cannot say that the Board's remedy is oppressive or not appropriately designed in view of respondent's failure to bargain in good faith before unilaterally introducing a wage change held to be an unfair labor practice. And that the Board ordered remedy is not reasonably designed to effectuate the statutory policy of good faith collective bargaining.

With exceptions noted, the Board's Order will be enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. KING RADIO CORPORATION, INC., Respondent.	No. 119-68

JUDGMENT

Before: Murrah, Chief Judge, Tuttle* and Breitenstein, United States Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated July 9, 1968, directed against the above-named Respondent, its officers, agents, successors and assigns. The Court heard argument of respective counsel on July 9, 1969, and has considered the briefs and transcript of record filed in this case. On September 17, 1969, the Court, being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that King Radio Corporation, Inc., its officers, agents, successors and assigns, shall:

a. Cease and desist from:

(1) Maintaining and enforcing, against employees for union organizational affiliation, activity, support or sym-

*Of the Fifth Circuit, sitting by designation.

pathy, a discriminatory absolute ban upon talking while at work, and a discriminatory warning-notice rule and system in connection therewith; without prejudice to the right to bargain in good faith with the employees' Union concerning valid, nondiscriminatory workrules.

(2) Engaging in surface bargaining or other collective bargaining not in good faith, without real intention of reaching agreement with Communications Workers of America, AFL-CIO, as duly designated exclusive bargaining representative of its employees in the following unit appropriate for bargaining purposes:

> All production and maintenance employees at the 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including plant clericals, but excluding the office-clerical employees, accounting department employees, research and development employees, and professional employees, guards, and supervisors within the meaning of the Act.

(3) Maintaining in effect for any employee in said bargaining unit, the wage structure system or any portion or aspect thereof established by Respondent on or since February 1, 1967, other than all wage increases granted thereunder whether pursuant to any minimum wage law amendment or otherwise; unless bargained in good faith with said Union.

(4) Hiring, employing, arranging or offering to hire or employ, paying or agreeing to pay, any employee or replacement or substitute for any employee, in said bargaining unit, at a wage or wage rate, wage rate progression, emolument or thing of value, or wage rate structure system, other than that in existence in said bargaining unit immediately prior to that established unilaterally by Re-

spondent on February 1, 1967, without bargaining in good faith thereon with said Union; *except* for any increases in minimum wage rates, whether statutory or otherwise, established by Respondent on or since February 1, 1967, for each and every job classification.

(5) Unilaterally changing, threatening to change, or announcing any change in, wages (except as may hereafter be required by the express provisions of any minimum wage law or amendment or other statute), wage rate progressions, wage structure system, or any other term or condition of employment of said bargaining unit employees without bargaining in good faith with said Union in regard thereto.

(6) Threatening, warning, advising, or notifying any employee engaged in an unfair labor practice strike, that said employee or any other such striking employee will or may be discharged or permanently replaced or deprived of any economic benefit accruing in connection with his employment (other than wages while so striking, provided his employment has not unlawfully been actually or constructively terminated or suspended by Respondent) unless said employee returns to Respondent's employ.

(7) In any other manner interfering with, restraining, or coercing any employee in the exercise of his right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

b. Take the following affirmative actions necessary to effectuate the policies of the Act:

(1) Forthwith abrogate, cancel, and disestablish, in all respects, the wage structure system which Respondent unilaterally established and placed into effect for bargaining unit employees on and since February 1, 1967; *provided*, however, (a) that all increased minimum wage rates, whether statutory or otherwise, for all job classifications, placed into effect by Respondent for said unit employees on or since February 1, 1967 shall not be abrogated, reduced or otherwise changed without bargaining in good faith with the Union thereon, *and* (b) that in all respects other than said increased minimum wage rates (whether statutory or otherwise, for all job classifications), the wage rate progressions, wage rate progression system (including automatic wage rate progressions), and all other features of Respondent's wage structure system which were in effect immediately prior to Respondent's said February 1, 1967 unilateral change, shall forthwith be reinstituted and restored, and shall not be changed without bargaining in good faith with the Union thereon.

(2) Forthwith abrogate, cancel, and disestablish all changes in any term or condition of employment of said bargaining unit employees, other than any increase in minimum wage rates (whether statutory or otherwise, for all job classifications) as hereinabove provided, which have been established for said unit employees by Respondent at any time since said unit employees have been represented for collective bargaining by Communications Workers of America, AFL-CIO, unless said changes are bargained in good faith with said Union.

(3) Upon request, bargain in good faith with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of Respondent's employees in said bargaining unit, and embody in a signed con-

tract any agreement reached. For purposes of such bargaining, the period of one year following posting by Respondent of the attached Notice marked "Appendix" shall be deemed and considered to be the initial certification year of Communications Workers of America, AFL-CIO, and the Board certificate issued to said Union shall be deemed to be amended and conformed accordingly.

(4) Upon application, reinstate to their former or substantially equivalent positions, without prejudice to their wage rates, seniority, and other rights and privileges, employees who went on strike on or since March 27, 1967; discharging, to the extent necessary, all employees hired since that date. In the event that after dismissal of those employees who were hired by Respondent on and after March 27, 1967, there are not sufficient jobs at Respondent's plants for all striking employees of Respondent who apply for reinstatement, such jobs as are available shall be filled from among said striking employees seeking reinstatement, in accordance with their seniority or other nondiscriminatory practice heretofore applied by Respondent in the conduct of its business. In the event Respondent fails so to reinstate or to place upon a preferential hiring list as hereinbelow provided, any striking employee after his application in accordance herewith (or fails to hire him from such preferential hiring list as hereinbelow provided), Respondent shall reimburse such striker in the manner set forth in "The Remedy" section of the Trial Examiner's Decision, for losses sustained commencing 5 days after the application for reinstatement (or for losses sustained in the event of Respondent's failure to hire him from such preferential hiring list).

(5) Place all striking employees of Respondent who apply for reinstatement and for whom no employment is

available upon a preferential hiring list, with priority in accordance with such system of seniority or other non-discriminatory practice heretofore applied by Respondent in the conduct of its business; and thereafter offer such employees reinstatement as such employment becomes available and before other employees are hired for such work.

(6) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain and analyze the right to reinstatement and to backpay, if any, under the terms of this Judgment.

(7) Notify each of the said employees entitled to reinstatement who may currently be serving in the Armed Forces of the United States, of his right to full reinstatement upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended.

(8) Post in each of its plants in Olathe, Kansas, copies of the Notice attached hereto marked "Appendix." Copies of said Notice, on forms provided by the Regional Director for the Seventeenth Region, (Kansas City, Missouri), shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced, or covered by any other material (including any other Board Notices required to be posted).

(9) Notify said Regional Director, in writing, within 10 days from the date of this Judgment, as to what steps have been taken to comply herewith.

/s/ Alfred P. Murrah
Judge, United States Court of Appeals for the Tenth Circuit

DATED: Nov. 3, 1969.

A true copy
Teste
William L. Whittaker
Clerk, U. S. Court of Appeals, Tenth Circuit
By /s/ Helen R. Bartha
Deputy Clerk

(Seal)

NOTICE TO ALL EMPLOYEES
PURSUANT TO

A Judgment of the United States Court of Appeals
enforcing in part an order of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

AFTER A HEARING DULY HELD, IT WAS DETERMINED THAT KING RADIO CORPORATION, INC., HAS VIOLATED THE NATIONAL LABOR RELATIONS ACT. IN ORDER TO REMEDY THIS CONDUCT, WE HAVE BEEN REQUIRED TO POST THIS NOTICE AND TO TAKE THE FOLLOWING STEPS:—

1. *WE WILL* bargain collectively in good faith, upon request, with COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, as the exclusive representative of all of our employees in the following collective bargaining unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and embody in a signed written agreement any understanding reached:—

   All production and maintenance employees at the 400 North Rogers Road and 139 South Brockway, Olathe, Kansas, plants of King Radio Corporation, Inc., including plant clericals, but excluding the office-clerical employees, accounting department employees, research and development employees, and professional employees, guards, and supervisors within the meaning of the Act.

2. *WE WILL* immediately cancel the new wage structure system which we placed into effect in the above bargaining unit on and since February 1, 1967, *EXCEPT* for any higher wages. *WE SHALL* continue to pay those higher wages and shall not reduce or otherwise change them without bargaining in good faith with COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.

3. *WE WILL* also immediately cancel all other changes in any term or condition of employment in the above bargaining unit, *except* such higher wages, which have been placed into effect without bargaining in good faith with COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, at any time since that Union has represented our employees for collective bargaining purposes.

4. *WE WILL* immediately place back into effect the wage structure system, including automatic wage rate progressions, which was in effect immediately prior to February 1, 1967; *except* that we will keep in effect all increases in minimum wages (whether under any minimum wage law amendment or otherwise, for all job classifications) placed into effect on or since February 1, 1967.

5. *WE WILL*, upon application, reinstate to their former or substantially equal jobs, without affecting their wage rates, seniority or other rights and privileges, all employees who went on strike on or after March 27, 1967; and, to the extent necessary to accomplish that, *WE WILL* discharge any and all employees, replacements, or substitutes hired since then. *AND*, in the event we fail to reinstate any striking employee who applies for reinstatement, *WE WILL* compensate each and every such employee by paying to him or them moneys covering any and all losses (including backpay and interest) sustained commencing 5 days after the application for reinstatement. In the event there are insufficient jobs open for the purpose of such reinstatements, we will set up and hire such striking employees from a preferential hiring list on a nondiscriminatory seniority basis.

6. *WE WILL NOT* maintain and enforce against employees for Union organizational affiliation, activity, support or sympathy, a discriminatory prohibition of all talking while at work, or a discriminatory warning notice system in connection therewith; but, instead, *WE WILL* bargain with the Union about valid, nondiscriminatory workrules.

7. *WE WILL NOT* threaten, warn, advise, or notify any employee striking because of any unfair labor practice that he or any other such striking employee is subject to discharge, permanent replacement, or deprivation of benefits (other than his wages while out on such strike) unless he returns to work.

8. *AND WE WILL NOT* in any other manner interfere with, restrain, or coerce any employee in the exercise of his right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his own choosing; to engage in concerted activities for the

purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

9. *WE WILL DEAL AND COOPERATE WITH YOUR UNION IN EVERY WAY THAT THE LAW REQUIRES, SO THAT YOU MAY BARGAIN COLLECTIVELY WITH US IF THIS IS WHAT YOU DESIRE.*

King Radio Corporation, Inc.,
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: If any of the above employees is presently serving in the Armed Forces of the United States, we shall notify him of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri, 64106 (Tel. No. FR4-5181).

APPENDIX C

Relevant Provisions of the National Labor Relations Act

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . .

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SEC. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no

expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employer, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and

10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SEC. 10. (e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence

to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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No. 1140

In the Supreme Court of the United States

OCTOBER TERM, 1969

KING RADIO CORPORATION, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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378-886—70

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A–7A) is reported at 416 F. 2d 569. The Board's decision and order (A. 1067–1084)[1] are reported at 172 NLRB No. 109.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1969 (Pet. App. A8, A14), and a petition for rehearing was denied on November 17, 1969. The petition for a writ of certiorari was filed on February 2,

[1] "A." refers to the joint appendix to the parties' briefs in the court below.

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the company violated Section 8(a)(5) and (1) of the National Labor Relations Act by granting a general wage increase and making other changes in its wage system without first bargaining in good faith to an impasse with the employees' union representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A18–A21 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Company manufactures aircraft radios in its "Silver Crown" and "Gold Crown" plants in Olathe, Kansas. After a Board-conducted election held in June 1966, the Communications Workers of America, AFL–CIO ("the Union") was certified as the representative of the production and maintenance employees at these plants. In prior proceedings (166 NLRB No. 70 and 166 NLRB No. 10), the Board found that the Company, both before and after the election, engaged in a variety of unfair labor practices, in violation of Section 8(a)(1), (3), and (5) of the Act. These included the unilateral promulgation and enforcement of a "no-talking" rule,

the unilateral termination of payroll deductions, the unilateral establishment of a new retirement policy, and the discharge of individuals because of union activity and for testifying in a Board proceeding. The court of appeals sustained the Board's unfair labor practice findings and enforced its order, 398 F. 2d 14. Meanwhile, negotiations between the Company and the Union commenced in October 1966, and the present case involves the propriety of the Board's finding that the Company further violated the Act by making wage changes during those negotiations without first bargaining about them with the Union. The facts with regard to the wage changes are as follows:

The bargaining unit consisted of about 350 employees, most of whom were women assigned to various job classifications (A. 869–879). Under the Company's practice during the period in question, employees without experience were hired as "Trainees" at $1.25 an hour; experienced employees were hired at from $1.40 to $1.50 an hour, depending on the classification. Whether hired as "Trainees" or at a higher rate, new employees received 5¢ an hour raises each month for the first four months. Wage progression was automatic to the top rates, which ranged from $1.60 to $1.90. (A. 1094, 1097, 1109, 1112; 253, 254.)

The Union's initial wage proposal, which it submitted on October 25, suggested a hiring base rate of $1.60 an hour for all classifications, and top rates ranging from $2.15 to $2.60. Employees would start at the base rate and receive 10¢ increases every three

months until they reached the top of their classification. (A. 1347–1359.)

On December 1, the Company made this counterproposal: (1) employees hired as "trainees" would receive $1.40 an hour (instead of $1.25), and would advance to the "starting rate" of $1.50 after 90 days; (2) employees hired at the "starting rate" of $1.50 an hour would receive 5¢ an hour increments each 90 days until they reached their "base rate," ranging from $1.65 to $1.85; (3) after attaining the "base rate," employees would receive—at the Company's sole discretion—merit increases of 5¢ an hour each six months until they reached their "top rate," ranging from $1.75 to $2.20; (4) the Company could, in its sole discretion, designate employees as "lead men" and award them premium pay; and (5) the Company would be free to pay more than the specified rates to any employee who, in its opinion, had demonstrated "outstanding performance or ability" (A. 111, 112). The Union objected to this proposal as inadequate, unreasonable and, because of its merit features, conducive to favoritism (A. 112; 254, 270).

At the December 9 bargaining session, the Union reduced its wage demand. It proposed that employees currently at the top rate should receive immediately half the difference between that rate and the rate the Union had originally proposed; thereafter they would progress to the new top rate by raises of 10¢ every 90 days. Employees below the top rates would receive one-half the difference between their current rate and what they would be making under the Union's pro-

posal, taking into account their length of service. The Company did not agree to this proposal. (A. 962–963.)

At the bargaining session on January 9, 1967, Company representatives stated that "they had offered all they intended to in the area of wages" and "did not intend to spend more money than they had already proposed" (A. 114; 261, 1805; 365). Company Attorney Haynes added that the Union "had made wild promises to the employees during the organizing campaign and [the Company] intended to see that the Union did not pay off on these promises" (A. 1115; 276). Three days later, the Company wrote the Union, proposing an immediate 10¢ across-the-board increase if the Union would accept the Company's entire wage package and regard the raise as a substitute for two periods of review except as to employees receiving less than the "starting rates" (A. 1115).

On Saturday, January 28, the Company wrote the Union of its intention to give "wage increases to all bargaining unit employees not to exceed those offered but rejected by the Union" (A. 1116). According to the Company, the action was "a result of the Fair Labor Standards Act minimum wage requirements" scheduled to take effect on February 1 (A. 1117).[2] There had been no previous reference at the bargaining table to the February 1 change in the minimum wage law, nor had the Company at any time indicated that it contemplated putting its 10¢ wage offer into effect with or without the Union's consent (A. 1096–1098, 1116). The Union received the letter on Janu-

[2] The amendment raised the minimum wage to $1.40 an hour.

ary 30, and arranged to meet with the Company the following day (A. 1116; 281).

At the meeting, the Union consented to the raises required by law—which involved only about 30 of the 350 employees in the unit—but objected to the rest (A. 1096; 281–283). Attorney Haynes conceded that only a few raises were mandatory, but stated that, whether or not the Union agreed to the Company's proposal, it would be put into effect on the following day (A. 1118; 729, 735).[3] Haynes added that all the discretionary features of the Company's earlier wage proposals would also go into effect (A. 1096). The following day, the Company posted a notice that "the Company is making the following changes in its classifications and minimum rates of pay for employees included in the bargaining unit." In addition to a 10¢ raise for "all employees not affected by the wage and hour increases," the notice set forth the four-part (*i.e.*, "Training," "Starting," "Base," and "Top") wage rate system previously proposed; instituted 90-day and 6-month review periods; and eliminated review of employees above the "starting" rate for "two consecutive normal review periods" (A. 1096–1097, 1116–1118).

The parties met again on March 24, and the Union submitted a lower pay proposal for the first year of the contract (A. 1123; 888). Attorney Haynes rejected it, stating that he would negotiate on wages for the second and third years of the contract but was "not

[3] Asked if his intention was "to establish wages now for this year," Haynes replied, "that [is] right" (A. 734–735).

willing to negotiate on wages for this year" (A. 1123; 306).[4] On March 27, the employees went on strike. During the strike, the parties bargained on three occasions, but, when the wage issue arose, Attorney Haynes reasserted that the Company had no more to give during 1967 (A. 1127; 772–773).

B. THE BOARD AND COURT DECISIONS

Adopting the Trial Examiner's decision, the Board found that the Company's unilateral wage and wage system changes violated Section 8(a)(5) and (1) of the Act. Rejecting the Company's contention that it had bargained in good faith to impasse about its wage proposal before puttting it into effect, the Board noted that the parties' negotiations "were then * * * in mid-stream and no impasse had been reached, as to wages or otherwise"; that the Company's conduct at the bargaining session of January 31 "evidences no real disposition on [the Company's] part to bargain" about the changes; that the Company failed to justify the need to institute immediately wage increases not required by law as well as the "far reaching wage structure changes"; and that the foregoing conduct took place amidst a "stream of unfair labor practices perpetrated contemporaneously, as well as previously and subsequently" (A. 1097–1099). The Board concluded that the Company had "seized upon the minimum-wage law amendment to introduce substantial changes in its wage structure unilaterally and to use

[4] Haynes said again that he "knew that the Union had made a lot of wild promises to the employees * * * and they weren't going to wind up with a wage increase this year" (A. 1123).

the statutory amendment as an excuse for continuing not to bargain in good faith * * *'" (A. 1100). The Board ordered the Company, *inter alia,* to restore its former wage system,[5] and to refrain from making future changes in it without first bargaining in good faith with the Union (A. 1173, 1175).

The court of appeals found that there was no substance to the Company's contention that the minimum wage law amendment had "prompted a good faith increase for all bargaining unit employees," for the increases "were unequally distributed among the employees in the bargaining unit without regard to merit" (Pet. App. A2–A3). The court also found that the Company had failed to sustain its contention that "the unilateral wage changes were instituted after the point of impasse had been reached," observing that "[t]he wage changes were instituted during purported negotiations concerning that very subject" (Pet. App. A3). Accordingly, the court sustained the Board's finding that the Company's unilateral wage changes violated Section 8(a)(5) and (1) of the Act, and enforced the Board's order in that regard (Pet. App. A3, A6–A7).

ARGUMENT

The question which the petition seeks to raise (Pet. 2, 9–10)—whether an employer during contract negotiations may lawfully give a raise over the bargaining agent's objection after the employer has

[5] The Board provided, however, that "All increased minimum wage rates, whether statutory or otherwise, for all job classifications * * * shall not be abrogated or reduced or otherwise changed without bargaining with the Union thereon" (A. 1174).

bargained about the matter in good faith—is not presented here. The Board found that the Company "did [not] in fact bargain in good faith with the Union concerning these changes," and that the parties had not bargained to impasse before the employer's unilateral action (A. 1096, 1097). The court of appeals sustained both findings, holding that the raise was "not a good faith increase" and that the wage system changes were made, not after impasse, but rather "during purported negotiations concerning that very subject" (Pet. App. A3). Given these findings, the decision below is in accord with settled authority. *E.g., National Labor Relations Board* v. *Katz,* 369 U.S. 736; *National Labor Relations Board* v. *Crompton Highland Mills, Inc.,* 337 U.S. 217, 221–225; *National Labor Relations Board* v. *Insurance Agent's International Union,* 361 U.S. 477, 485; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U.S. 376, 383–385; *National Labor Relations Board* v. *United Nuclear Corp.,* 381 F. 2d 972, 977–978 (C.A. 10). Petitioner's contention that it negotiated in good faith to the point of impasse thus raises only an evidentiary issue which is not appropriate for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

In any event, the record amply supports the Board's finding that the Company's actions were not taken in good faith. Thus, while the Company's January 12 letter offer of a 10¢ raise introduced an important new element into wage bargaining, the parties had no opportunity to discuss the matter until the emergency meeting of January 31. At that meeting, meaningful negotiations

were precluded by the Company's adamant position that its whole wage package had to go into immediate effect. (*Supra*, p. 6.) Moreover, the Company was required by law to raise the wages only of some 30 of the 350 employees in the unit and its excuse that the other raises were necessary to preserve wage comparability was belied by the fact that those raises exceeded the amount of the minimum wage increase and were distributed unequally among the remaining employees (A. 1095; Pet. App. A2–A3). Finally, the Board was entitled to consider the fact that the unilateral actions were set in a "stream of unfair labor practices perpetrated contemporaneously as well as previously and subsequently" (A. 1099).

The cases cited by petitioner as in conflict with the decision below are factually distinguishable. In *National Labor Relations Board* v. *Landis Tool Co.*, 193 F. 2d 279 (C.A. 3), the alleged violation involved an increase of 7 cents given to 15 pattern makers at the same time that 900 other plant employees received the same increase; the union did not object until 4 months later, and the court found that the pattern makers' raise was in fact pursuant to an understanding reached earlier by the parties. In *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150–152 (C.A. 7), the union proposed a 16-cent raise and other economic improvements; the employer, after full consultation with the union, then put a 15-cent raise into effect and advised that it was willing to continue bargaining about the balance of the union's demands. In addition, as the court noted, the parties had a long history of friendly relations. Here, in contrast, there was

little or no consultation with the Union prior to the Company's unilateral action; the changes went far beyond a raise in wage rates; the Company immediately withdrew from further wage bargaining for the rest of the year; and the conduct took place against a background of virulent opposition to the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

MARCH 1970.

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